No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G. SCHULTZ,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

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APPELLANT'S REPLY TO APPELLEES' BRIEF

C. H. RICHESON
Phoenix, Arizona
Attorney for Appellant.

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BRIEF OF ARGUMENT

Appellees' four arguments, namely,

FIRST: Is this appeal premature?
SECOND: Was the appellant ever entitled to default?

THIRD: Does the second amended complaint present any question upon which the Federal Court has jurisdiction?

FOURTH: Does the second amended complaint set forth any grounds upon which relief could be granted? will be discussed in this reply in the sequence mentioned.

Appellant is convinced that the position taken by the appellees in their brief is erroneous and is not an answer to the charges made in appellant's Record and Brief made in the court below.

ARGUMENT

I

The appellees further state that the Federal Courts follows the practice prevailing in the State courts, and object that they had no chance to file a bill for costs.

Beginning with the last argument, that appellees had no chance to file a cost bill, there is nothing in the record to show, and in fact there was no attempt on the part of appellees to file a cost bill, and certainly appellees cannot charge appellant with the duty to protect appellees' interest in any way in this litigation.

As to not filing a final judgment in this case, the question of what is a final judgment or decree depends on its essence and not its form or what it is called, and the Supreme Court has been liberal and not technical in construing the words "final judgment" or "decree." To be final the controversy must be settled and the case must be left in such a condition that if there be an

affirmative by the appellate court, the court below will have nothing to do but execute the judgment. *The question must be determined by Federal and not State law.* It is also settled that the face of the judgment or decree is the test of its finality.

Simkins Federal Practice, Third
Edition, PP. 608-609, Par. 847.

It is certain that the order dismissing this cause because the complaint does not state a cause of action is final, as there is nothing left, if affirmed by the court of appeals, to do but to execute the order of the court below.

Hoharst v. Hamburg-American Packet Co.,
148 U. S. 265;

French v. Shoemaker, 12 Wall 98,
20 L. Ed. 271;

West v. East Coast Cedar Co.,
113 F. 743;

National Bank v. Smith,
156 U. S. 333;

Megher v. Minnesota Thresher Mfg. Co.,
145 U. S. 611.

A judgment is a sentence of the law pronounced by the court upon the matter contained in the record. 3 Blackstone Commentaries 395.

As to the Federal courts being bound to follow the

practice prevailing in the State courts, the Federal courts are no longer governed by the State practice in the matters of pleadings, but by the Federal Rules of Procedure in the District courts.

Schenley Distillers Corporation v.
Renkin, 34 F. Supp. 687.

It was held that an order dismissing for want of jurisdiction was an order from which an appeal could be taken in Mosher v. City of Phoenix, 287 U. S. 67.

II

Appellees contend appellant is not entitled to default, for the following reason: First, that appellant's original complaint was against the State Board, and quote Section 4-503 of the 1939 Laws of Arizona as authority for Cecil A. Edwards, an Assistant Attorney General, to appear and obtain a continuance from the United States District Court for time to answer. Yet after quoting this statute appellees state: "It cannot be determined from the original complaint filed herein whether the defendants were being sued as individuals or as a State board." It is clear from the relief asked for the appellant was asking for damages caused by appellees individually, and each of them, and not as a board. Paragraph VII of the original complaint settles the question as to whether the appellant was suing appellees as a board or as individuals. Paragraph VII read as follows:

"Plaintiff alleges that, in addition to denying this plaintiff the right to take the examination as a doctor of medicine, defendants and each of them have caused the plaintiff to be arrested and tried in the courts of Maricopa County, Arizona, on a felony charge of practicing medicine without a license, although plaintiff was only treating patients as a naturopathic physician and has a license to practice the art of healing as a Naturopath under the laws of the state of Arizona.

"Plaintiff alleges that he was acquitted of said charge of practicing medicine without a license, in the courts of Maricopa County, Arizona; that the defendants, and each of them, have caused numerous damage suits to be filed in the courts of Maricopa County, for malpractice, which suits have been decided in favor of the plaintiff." R. 14-15.

Further, this claim by appellees is refuted by the fact that Senate Bill 61 was introduced in the Sixteenth Legislature of the State of Arizona, which would permit the Attorney General and his assistants to appear for appellees when sued for damages. See Page 38 Appellant's Brief; after this suit was filed.

Section 4-502 of the Laws of Arizona 1939 provides as follows:

"Duties.—The attorney-general shall:

"1. Devote his entire time to the discharge of the duties of his office and not engaged directly or indirectly in the private practice of law;"

This question was definitely decided by the Supreme Court of the State of Arizona in Conway v. State Consolidated Publishing Co., 112 P. 2d 218. This case definitely decided that the Attorney General nor his deputies had not the right to engage in the private practice of law. The United States courts follow the construction of State laws by the Supreme Court of that State.

Shaver v. Nash, 29 S. W. 2d 298, 73 A. L. R. 961;

Erie R. R. Co. v. J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey, et al, 61 U. S. 945; 313 U. S. 569, 115 F. 2d 968, 30 F. Supp. 41.

It will be noted that appellees in the preamble to their brief state: "It will be noted that Mr. C. A. Edwards, who was formerly connected with this case, comes in for a great deal of comment in appellant's brief, and in tribute to Mr. Edwards the appellees desire to make it known to the Court that Mr. Edwards is now a member of the armed forces of the United States Government and is no longer an attorney in this case."

Appellant wishes to call to the attention of the Court the fact that a copy of appellant's brief was served on the Attorney General of the State of Arizona, the Hon. Thomas J. Croaff, who succeeded Cecil A. Edwards, receipting for same; that neither Mr. Croaff nor the Attorney General, Mr. Joe Conway, is entered here as

joining in paying tribute to Mr. Edwards. In fact appellant is well informed that after receiving appellant's brief, the Attorney General notified the appellees that he was of the opinion that they never belonged in this case as counsel for appellees, which is supported by the fact of his absence. Therefore the fact that Mr. Edwards was drafted into the armed forces of the United States does not in any way mitigate the unlawful and wrongful appearance by him, at State expense, for appellees in the court below to obtain a continuance of time in which to answer.

Appellees further contend that appellant has no right to default because by filing the second amended complaint the right under the original complaint was abandoned. This doctrine applies only to an amended complaint which creates a new cause of action.

Union Pacific R. R. Co. v. Otto Wyler,
158 U. S. 285.

It is fiction of law to claim abandonment of a cause of action when it will operate to cut off a substantial right when amended pleading does not allege a new cause of action.

Black Mountain Corporation v. Webb,
14 S. W. 2d 1063.

This doctrine of law is supported by the cases cited by appellees. In the case of United States v. Gentry, 119 F. 70, the court said: "An amended complaint which is complete in itself and which does not refer to

or adopt the original complaint as a part of its entirely supersedes its predecessor and becomes the plaintiff's sole cause of action." In Shafer v. Ackling, 218 N. W. 286, again, the court said: "The defendant abandoned lack of consideration for guarantee agreement on note and absence of guarantee agreement by amending answer and interposing plea of release." In Jennings v. Fayne, 10 S. W. 2d 1101, the court said: "Plaintiff abandoned cause of action for breach of warranty as to acreage conveyed by filing amended petition alleging fraud and deceit." The same condition exists in McLain Bank v. Pascagoula National Bank, 117 So. 124. It is a fiction of law to assume that where the amended complaint dose not forsake the action in the original complaint, that the amended complaint abandons any right under the original complaint. However, the fact that Cecil A. Edwards unlawfully and wrongfully appeared as counsel for appellees and obtained an extension of time to answer gives appellees no right to the claim of abandonment to protect themselves against this unlawful and wrongful act in relying upon a public servant who might by any method be persuaded at public expense to defend them against their alleged wrongful acts which were complained of in the original and the second amended complaint. In both complaints, the original and second amended, the appellees are charged with violation of the anti-trust laws of the United States, causing appellant great injury, and appellant submits that Cecil A. Edwards before appearing and asking for a continuance of time to answer for appellees was advised by counsel for appellant that the Attorney

General nor his deputies had no lawful right at public expense to defend appellees and in fact expressed the opinion that if he as Assistant Attorney General belonged in the case, it was to help prosecute appellees for violation of the anti-trust laws, which had caused appellant's damage.

Wherefore, appellant insists that we are entitled to judgment on the pleadings by default because of the wrongful and unlawful appearance of Cecil A. Edwards, Assistant Attorney General of the State of Arizona.

III

Appellees claim that the Fourteenth Amendment to the Constitution does not give the Federal courts jurisdiction of this action. Appellees state, Page 11 of their Brief: "It has been universally held that the Fourteenth Amendment adds nothing to the rights of one citizen as against another. It simply furnishes a guarantee against any encroachment by the State upon the fundamental rights which belong to every citizen." Appellees easily forget that in appellant's second amended complaint, Paragraph VIII, we alleged as follows:

> "That all the defendants, except Charles C. Bradbury, are members of the Maricopa County Medical Association, and of the Medical Association of the State of Arizona, and of the American Medical Association, all of whom work in close cooperation and maintain the same standards,

rules and requirements through their legislative committees, in regard to the examining and licensing of applicants for the practice of medicine and surgery in Arizona; and that the Association of American Medical Colleges is sponsored and supported by the aforesaid American Medical Association, but that both the American Medical Association and the association of American Medical Colleges are monopolistic and in fact a trust and are engaged in interstate traffic and monopoly in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona, in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and individually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to their knowledge." R. 44-45.

The appellees are charged with obtaining the legislation under which they attempt to act in depriving appellant of his rights, which brings them within the purview of the Fourteenth Amendment to the Constitution. In addition they are charged with violating the anti-trust laws of the United States.

The third and fourth questions raised by appellees, asking whether the second amended complaint presents any question upon which the Federal Court has jurisdiction, as does the second amended complaint set forth any grounds upon which relief could be granted can be answered together. Even if the Fourteenth Amendment to the Constitution had not been set up in the original and second amended complaints, it is clear that in both complaints there is an allegation of violation of the anti-trust laws, by which appellant's rights have been denied and which has caused appellant great injury.

Simkins Federal Practice, 1939, Third Edition, Page 32, Paragraph 21, states:

> "Jurisdiction of the District Court. The jurisdiction of the district court is outlined in Par. 24 of the Judicial Code as amended. This section contains twenty-eight subsections, and includes jurisdiction of suits under many special federal laws. These subsections may be briefly summarized as follows:
>
> " x x x
>
> "23. Suits against trusts, monopolies, and unlawful combinations;"

And Paragraph 22, Page 35:

> "Requisites of Jurisdiction as a Federal Court. Thus the original jurisdiction of the District

Courts in suits of a civil nature at common law or in equity may be stated as follows:

"First. When the suit arises under the Constitution and laws of the United States, x x x "

See Brief for the Appellant, 51-53.

In the case of Mosher v. City of Phoenix, 287 U. S. 67, Chief Justice Hughes said: "There is no diversity of citizenship and jurisdiction depends upon the presentation by the bill of complaint of a substantial Federal question. Jurisdiction is to be determined by the allegations of the bill and not by the way the facts turn out or by a decision of the merits." This is supported in Pacific Eelectric Railway Company v. Los Angeles, 194 U. S. 112; Columbus R. R. Power & Light Co. v. Columbus, Ohio, 249 U. S. 39, 6 A. L. R. 1648.

When appellees in their argument, Page 11, state, "He is seeking here in a backhanded way to attack the constitutionality of a law passed by the Legislature of the State of Arizona without any allegation or other showing that the defendants, or any of them, have any interest in the enforcement of the law or that they are in any way charged with the duty of enforcing it," again we cite the Court to Paragraph VIII of the second amended complaint, wherein we charge the appellees, through their legislative committees, with being sponsors of the law, in violation of the Anti-trust Act, and in the brief openly contend these laws are unconstitutional. Appellant's original brief, 52-55.

Appellees state, Page 16 of their brief: "No where in the 2nd Amended Complaint does it appear that the

acts complained of are in restraint of trade in interstate commerce. Without such an allegation the plaintiff has no action." The eight paragraph of the second amended complaint states in part as follows:

> " x x x that both the American Medical Association and the association of American Medical Colleges are monopolistic and in fact a trust and are engaged **in interstate traffic and monopoly** in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona, in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and indicidually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to heir knowledge." R. 44-45.

Therefore we respectfully submited to the Court that the second amended complaint charges the appellees with engaging in interstate commerce in violating the anti-trust laws of the United States.

Respectfully submitted,

C. H. RICHESON
Phoenix, Arizona
Attorney for Appellant.